Beverly California Corporation, f/k/a Beverly Enterprises, its Operating Divisions, Regions, Wholly-Owned Subsidiaries and Individual Facilities and each of them (Beverly Manor Convalescent Hospital, Monterey, California) ***and*** **Service Employees International Union, Hospital and Health Care Workers, Local 250, SEIU, AFL–CIO, CLC.** Case 32–CA–11950–1 (formerly 6–CA–22084–15)

July 16, 2003

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND WALSH

On July 31, 2002, Administrative Law Judge Clifford H. Anderson issued the attached supplemental decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions, for the reasons set forth below, and adopts the recommended Order.

The issue presented here is the amount of backpay owed to discriminatee Nelia Aldape. The judge found that Aldape was entitled to backpay from her July 15, 1991 unlawful discharge until January 18, 2002.[1]

The Respondent excepts, arguing that Aldape's backpay should be tolled about August 1, 1991, when the State of California cited the Respondent for patient abuse by Aldape. We find no merit to this exception.

Background

In the underlying case,[2] certified nursing assistant Aldape was given a written warning on June 24, 1991, based on a complaint filed by the daughter of a patient in which the daughter asserted that Aldape had been rude to her mother.[3] Aldape believed that the writeup was not justified and immediately started engaging in union activities. After learning of those union activities, the Respondent conducted a meeting with employees where it expressed its opposition to the Union, and coercively interrogated employees about why they were organizing. After employees voiced their displeasure over perceived arbitrary discipline, the Respondent reopened the Aldape matter and suspended her pending an investigation to determine whether Aldape should be discharged. Thereafter, on July 12, Director of Nursing Janis Asfoor informed Assistant Director of Nursing Julia Michaels that the Respondent would discharge Aldape and another employee because of the Union. Asfoor then telephoned Aldape and informed her that she was suspended because of her union activities. On July 15, the Respondent discharged Aldape, citing her "gross misconduct."

The Board adopted the judge's finding that Aldape was suspended and discharged for engaging in union activity.[4] In so doing, the Board also adopted the judge's conclusion that the Respondent failed to meet its burden of establishing that patient abuse had actually occurred. As the judge found, Aldape was the only individual involved in the alleged incident to testify, and all other evidence with regard to the incident was hearsay, at best.

The Seventh Circuit enforced the Board's decision in relevant part.[5] The court found that the Respondent's behavior demonstrated that it had not viewed Aldape's alleged rudeness to a patient as warranting anything more than a warning until Aldape engaged in union activities. Thereafter, as found by the court, the Respondent reopened the matter and, by the statements of its own managers, suspended and discharged Aldape because of her union activity. As found by the court, "[t]hat is plenty to support the Board's conclusions."[6]

Backpay Case

The General Counsel alleges in this backpay proceeding that, in order to make Aldape whole for her unlawful suspension and discharge, the Respondent must compensate her for lost wages, benefits, and interest for the period from July 15, 1991, until January 18, 2002. The Respondent excepts, arguing that Aldape's backpay should toll as of the date it learned of the State's citation against the Respondent for Aldape's alleged patient abuse.

The relevant facts establish that, a few days after Aldape's discharge, an anonymous complaint was filed with the California Department of Health Services accusing Aldape of patient abuse. Between July 18 and 23, 1991, the State visited the Respondent's facility and interviewed the staff, the patient, and the patient's daughter. Although the State reviewed Aldape's personnel files, it did not contact Aldape or the Union, nor did it consider allegations that the discipline was linked to Aldape's exercise of statutorily protected rights.

On August 1, 1991, the State found that Aldape had committed patient abuse. It cited the Respondent for the

[1] The latter date is 1 week after Aldape failed to respond to the Respondent's reinstatement offer. The backpay specification at issue covers the backpay period ending December 31, 2001.

[2] 326 NLRB 153 (1998).

[3] 326 NLRB at 192.

[4] 326 NLRB at 154.

[5] 227 F.3d 817, 838–839 (7th Cir. 2000).

[6] Id. at 839.

violation and assessed it a $1000 fine. The Respondent appealed the citation, wholly on procedural grounds, and a conference took place between the Respondent and the State. The State rendered an opinion on September 28 upholding the citation and fine. The Respondent did not appeal that decision.

The Respondent contends that because it would have discharged Aldape based on the citation alone, the judge erred by not tolling backpay on the date the State issued its citation. The Respondent argues that it has always terminated employees cited for patient abuse; accordingly, the State's citation should toll Aldape's backpay. Under the specific facts of this case, that argument fails.

In backpay proceedings, the sole burden on the General Counsel is to show gross amounts of backpay due: the amount the employee would have received but for the employer's illegal conduct. *Virginia Electric & Power Co. v. NLRB*, 319 U.S. 533, 544 (1943). Once that amount is established, "the burden is upon the employer to establish facts that would mitigate that liability." *NLRB v. Brown & Root, Inc.*, 311 F.2d 447, 454 (8th Cir. 1963). We find that the Respondent failed to meet that burden here.

We recognize that the Board has cut off a discriminatee's backpay rights based on after-acquired knowledge of the discriminatee's misconduct, where the employer can demonstrate that engaging in that misconduct would have led to termination in the past.[7] We have serious concerns about whether the State's citation constituted after-acquired knowledge, however. That citation rested primarily on evidence on which the Respondent allegedly relied when it unlawfully suspended and discharged Aldape for her union activities. The only arguable after-acquired evidence contained in the citation was a statement, obtained during the State investigation from the patient, that Aldape berated her for causing Aldape's discharge. Even as to this evidence, however, the Respondent does not contend that it would have suspended or discharged Aldape for that incident.

We further find that the Respondent failed to establish that it would have discharged Aldape based solely on the issuance of the State citation. Thus, the Respondent's managing director of human resources merely testified, in response to the question by the Respondent's counsel whether she knew of any instance where a nurse found by the State of California to have abused patients was not terminated, that she did not. However, the Respondent provided no specific instances in support of this testimony and supplied no documentary evidence except as to one employee. As to that employee, the record indicates that the Respondent's ultimate discharge decision was based upon information supplied to it by the State as a result of its investigation as well as the issuance of the citation.[8] Thus, this example does not establish that the Respondent's practice was to discharge employees based only upon receipt of a patient abuse citation. Moreover, there is no evidence that the citation rendered Aldape ineligible for work.[9]

A health care institution is, of course, free to maintain a policy of discharging nurses when it is cited by the State for patient abuse. Here, however, the Respondent has not demonstrated that it followed a policy of discharging nurses solely because their alleged conduct resulted in a State citation. Additionally, as determined in the underlying case, the Respondent has failed to prove that an incident of patient abuse actually occurred. That finding is the law of the case and governs us in remedying this unfair labor practice. Accordingly, we find that, just as the Respondent failed in the underlying case to meet its burden of demonstrating that it would have suspended or discharged Aldape absent her union activity, it has failed here to meet its burden of showing that the State citation alone would have caused it to suspend and discharge Aldape. We therefore agree with the judge that Aldape's backpay did not toll until January 18, 2002.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Beverly California Corporation, f/k/a Beverly Enterprises, its Operating Divisions, Regions, Wholly-Owned Subsidiaries and Individual Facilities and each of them (Beverly Manor Convales-

[7] *Axelson, Inc.*, 285 NLRB 862, 866 (1987); *Marshall Durbin Poultry Co.*, 310 NLRB 68, 69–70 (1993).

[8] Moreover, the respondent had initially discharged that employee for patient abuse, reduced the discipline following appeal, and then reinstated the discharge penalty following the citation and information from the State. That differs from this case where the Respondent—prior to Aldape's union activities—merely issued her a warning for her alleged patient abuse.

[9] Our colleague asserts that the record contains evidence that the Respondent had a history of discharging employees who have received a State citation for patient abuse. However, as explained above, the Respondent could provide only a single example of an employee who was terminated after receiving a State citation for patient abuse, and that example is distinguishable from the present case as the termination was based not just on the State citation but also on evidence disclosed by the State's investigation. Our colleague also asserts that a nursing home risks "further fines and devastating adverse publicity" any time it retains an employee who has received a State citation for patient abuse. No record evidence is cited to support this speculative assertion, which appears to suggest that dire consequences will result from retaining an employee cited by the State regardless of the severity of the conduct for which the employee was cited. In this regard, our colleague concedes that the State does not require the discharge of an employee who has been cited.

cent Hospital, Monterey, California), as well as their officers, agents, successors, and assigns shall pay to Nelia Aldape the sum of $64,403.51 for the period ending December 31, 2001, with interest to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), minus tax withholdings required by the Federal and State laws.[10]

CHAIRMAN BATTISTA, dissenting.

In my view, this case does not involve after-acquired knowledge, i.e., knowledge acquired by a respondent after a discharge has occurred. Rather, this case involves *an event* occurring after the discharge. That event was the State's finding of patient abuse by Nelia Aldape and the State's citation of the Respondent for that patient abuse. As the judge found, the record contains evidence that the Respondent has a history of discharging employees who have been found by the State to have engaged in patient abuse. There is no contrary evidence. Indeed, the Respondent's managing director of human resources testified that he knew of no instances where the Respondent has not fired an employee who was found by the State to have engaged in patient abuse. That evidence and testimony is not only uncontradicted, it comports with common sense. A nursing home risks further fines, as well as devastating adverse publicity, if it retains an employee who has been found by the State to have engaged in patient abuse.

With respect to the history of discharging employees whom the State has found guilty of patient abuse, my colleagues say that, with one exception, there is no documentary evidence of such discharges. However, as noted above, the history is supported by the evidence and by common sense. As to the documented discharge, my colleagues can only say that the discharge was supported by information supplied by the State, rather than by the citation itself. I do not agree with the distinction. The citation was based on the State's information, and it was the citation that prompted the risk of future fines and negative publicity.

In sum, the record amply supports the past history of discharging employees found guilty of patient abuse.

My colleagues also say that State citations do not legally compel a discharge or render an employee ineligible for work. That may be true, but it is irrelevant. It is the Respondent's past and prudent practice, not legal compulsion, which prompts it to discharge employees who are found guilty of patient abuse.

My colleagues concede that the question of whether the Respondent should discharge an employee because of a State citation for patient abuse is for the Respondent to decide. The Respondent has said that it would have discharged Aldape for that citation. And yet, my colleagues continue to run Aldape's backpay after that citation.

My colleagues contend that, in the underlying case, the Board found that union activity, rather than any patient abuse, was the reason for the discharge. I accept that. I also accept the Board's determination in the underlying case that the Respondent failed to meet its burden of establishing patient abuse by Aldape. However, it is the *State's finding* of patient abuse by Aldape, and the Respondent's citation by the State because of that finding, that toll the backpay here.

Finally, the judge found that the State's proceedings were tainted and flawed. In my view, the Board should not lightly condemn the integrity of State proceedings. It should do so, if at all, only upon strong evidence of taint or flaw. In the instant case, there is no such evidence.

Based on all of the above, I would toll backpay as of the Respondent's acquisition of knowledge of the State's finding of patient abuse by Aldape and its citation of the Respondent.

Virginia L. Jordan, Esq., for the General Counsel.
Keith R. Jewell, Esq., of Fort Smith, Arkansas, for the Respondent.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

CLIFFORD H. ANDERSON, Administrative Law Judge. On August 21, 1999, the Board issued its decision in *Beverly California Corp*., 326 NLRB 153 (1999). The decision ordered Beverly California Corporation, f/k/a Beverly Enterprises, its Operating Divisions, Regions, Wholly-Owned Subsidiaries and Individual Facilities and each of them to, inter alia:

> Take the following affirmative action necessary to effectuate the policies of the Act.
>
> (a) Within 14 days from the date of this order, offer Nelia Aldape full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position without prejudice to her seniority or any other rights and privileges previously enjoyed.
>
> (b) Make whole, commencing from the date of her unlawful discharge and suspension, employee Nelia Aldape for any loss of earning and other benefits suffered as a result of the discrimination practiced against her, in the manner set forthin the remedy section of the decision.

The Order further adopted the judge's remedy applicable to Nelia Aldape:

> All backpay and reimbursement provided herein, with interest, shall be computed in the manner described in *New Hori-*

[10] As found by the judge, this figure does not include any backpay and interest that may be due and owing for the period of January 1, 2002, through January 18, 2002.

zons for the Retarded, 283 NLRB 1173 (1987), and *F. W. Woolworth Company*, 90 NLRB 289 (1950).

On September 13, 2000, the United States Court of Appeals for the Seventh Circuit entered its judgment, reported at 227 F.3d 817 (7th Cir. 2000), enforcing in all respects the Respondent's remedial obligations concerning Nelia Aldape.

A controversy having arisen over the amount due Aldape under the terms of the Board's Order, the Acting Regional Director for Region 32, on February 22, 2002, issued a compliance specification and notice of hearing respecting Aldape. The Respondent filed a timely answer on March 2, 2002.

I heard the matter in Salinas, California, on June 6, 2002. Useful posthearing briefs from the General Counsel and the Respondent were submitted on July 11, 2002.

FINDINGS AND CONCLUSIONS

Based on the record as a whole, comprising the stipulated record, the testimony of the witnesses and the positions and stipulations of counsel at the hearing as well as the posthearing briefs of the parties, I make the following findings and conclusions.

I. THE BOARD'S ORDER

The Board's decision, *Beverly California Corp*., 326 NLRB at 154, held, inter alia:

> *B. Beverly Manor Convalescent Hospital facility, Monterey, California*
>
> (1) On June 24, 1991, certified nursing assistant Nelia Aldape, was given a written warning for an incident in which the daughter of a patient complained about her mother's treatment. Aldape believed that the writeup was not justified and immediately thereafter began promoting union representation. On July 7, 1991, the Respondent's area manager, Ronald McKaigg, told Administrator Susan Chavis that Aldape's conduct was really a dischargeable offense and that she should follow up on the matter. Subsequently, on about July 12, 1991, Assistant Director of Nursing Julia Michaels was informed by Director of Nursing Janis Asfoor that Aldape and charge nurse Josie Tillman, would have to be discharged because of the Union. That same day, Asfoor telephoned Aldape and informed her that she was being suspended because of her union activities. Three days' later, the Respondent discharged Aldape for what it called patient abuse.
>
> We agree with the judge that the Respondent unlawfully discharged Aldape for her union activities.[5] Three days prior to the discharge, Director of Nursing Janis Asfoor informed Aldape that she was being suspended and that her suspension was related to her union activities . . . . Inasmuch as the suspension was one of the steps taken as part of the Respondent's unlawful efforts to discharge Aldape, we find that the suspension also violated Section 8(a)(3) and (1) of the Act.

[5] We do not in any manner condone patient abuse. Where the Respondent has raised this matter here and, as discussed elsewhere by the judge, at other facilities in which it was alleged to have occurred, we adopt the judge's findings of unlawful conduct solely for the reason that the Respondent failed to establish such allegations. . . .

The Board adopted the following findings and conclusions of Administrative Law Judge Peter E. Donnelly as to Aldape:

> (2) The discharge of Aldape and 8(a)(1) allegations
>
> The question remains whether or not Aldape was discharged because of this union activity, and I am satisfied that there is clear and convincing evidence that this was the case.
>
> Originally, Aldape was given only a warning for the patient abuse incident. Presumably [Administrator] Chavis felt that this was the appropriate remedy for the infraction. Immediately thereafter, in response to this perceived mistreatment, Aldape sought out and promoted union representation. Chavis learned about it shortly thereafter. Chavis testified that she was advised on or about July 9 by [the Respondent's area manager] McKaigg that Aldape's conduct was really a dischargeable offense and was told by McKaigg to follow up on the matter. She did this by reopening the matter and subsequently concluding that Aldape should be discharged for "gross misconduct" and discharging her on July 15. The sequence of events is suspect. Could it be that Chavis, an experienced administrator, was unaware that patient abuse was a dischargeable offense and had to be so advised by McKaigg? It is more likely that the reassignment of the Donovan incident was in response to McKaigg's reaction to Aldape's union activity and his instruction to review the matter.
>
> Another weakness in the Respondent's position is the question of the propriety of a discharge penalty for the alleged offense. No patient abuse allegation was ever established. Except for Aldape, none of those participating in the incident testified. The evidence adduced with respect to the incident itself was basically of the hearsay variety, insufficient to show—despite the complaint from the patient's daughter—that the incident did in fact occur.
>
> Even accepting that the original warning was justified, there is no adequate explanation for reopening the matter. It does not appear that the patient's daughter was seeking more severe discipline for Aldape. In fact, it was necessary to solicit her to furnish a statement about the incident.[42] In short the probative relevant evidence in this record does not establish that the patient was abused by Aldape.

[42] The statement is also hearsay and without probative value to establish the incident, in fact, occurred.

II. THE COURT'S OPINION

Circuit Judge Wood, writing for the Seventh Circuit in *Beverly California v. NLRB*, 227 F.3d 817 (7th Cir. 2000), in enforcing the Board's decision in relevant part, addressed the Aldape discharge at 227 F.3d at 838–839:

6. Beverly Manor Convalescent hospital, Monterey (Beverly II)

Beverly Manor (Monterey) issued a warning to Nelia Aldape, a Certified Nurse's Assistant (CNA) regarding a complaint that she had mistreated a patient (essentially by being rude to her). Aldape was an active participant in a Union organizing drive. When the administrator of the facility, Susan Chavis, alerted Beverly's area manager, Ronald McKaigg, to Aldape's conduct, he determined that the infraction was actually a dischargeable offense; the matter was reopened and Aldape was discharged. . . .

. . . .

As for Aldape, Beverly argues that it met its burden of showing that she would have been discharged even if she had never engaged in Union activities. Although it argues that the finding of the California Department of Health Services that Aldape was indeed guilty of patient abuse is helpful to it, the Board correctly responds that this cannot be the case, because the findings of the state licensing agency issued after Beverly discharged her. At most, that fact would affect the proper remedy. The ALJ found that there was "clear and convincing evidence"—not just substantial evidence—that Aldape's discharge was motivated by her Union activity. The company's own behavior showed that it did not regard her rudeness to the patient as grounds for discharge, until after McKaigg intervened; it gave her only a warning and then re-opened the matter. Furthermore, director of nursing Asfoor directly told Aldape that her suspension was related to her union activity (a fact not only established by Aldape's testimony, but also corroborated by that of another employee). That is plenty to support the Board's conclusions.

III. STATEMENT OF THE ISSUES

The compliance specification addresses the calculation of the money due Nelia Aldape under the Board's Order quoted above. The specification alleges a backpay period for Aldape from July 15, 1991, through December 31, 2001.[1] Gross backpay, interim earnings, earnings expenses, and net backpay are alleged on a quarterly basis for the backpay period. A total amount due on a quarterly accrual basis is alleged respecting which the Board ordered interest calculation is to be calculated and applied to achieve the final sum due.

The General Counsel and the Respondent by stipulation and agreement tightly narrowed the issues in dispute respecting the compliance specification. The Respondent amended its answer to admit the correctness of the entire specification's backpay calculations preserving two alternate contentions respecting argued tolling of the backpay period. The first contention of the Respondent, as argued by counsel for the Respondent at the hearing, is that Aldape's,

> [B]ack pay period and the obligation to reinstate ended about August 1, '91, based on State findings, citations, and a citation review. That would bring the back pay to approximately $153.51, considering 21 days between 7/12, of '91 and August 1, of '91.

The Respondent's second contention is that, in all events, the backpay period was terminated by the claimants failure to respond to the Respondents January 11, 2002 offer of reinstatement. The General Counsel accepted that latter argument and modified the specification consistent with it. See footnote 1, supra.

Dealing with the argument that the backpay period was tolled as of August 1991, it is relevant to focus on what the Respondent is contending and what is not at issue in this proceeding. The Board, with court approval, found that Aldape was improperly terminated on July 15, 1991. That finding will not be revisited. The Respondent's contention here is that, had Aldape not been terminated, indeed had no union activity whatsoever occurred at the facility, the subsequent actions of the State of California in addressing the Aldape-patient incident, discussed infra, would have caused Aldape's termination by virtue of the State action.

The General Counsel initially argues that the Respondent's defense:

> [S]hould be rejected as a matter of law under the principle of *res judicata* either because all of the evidence necessary to make out this defense was known to Respondent and/or readily discoverable by it with reasonable diligence at the time of the unfair labor practice hearing but was not raised by it; and/or because Respondent did raise this identical defense in the underlying proceeding, at which point it was considered and rejected by the Judge, the Board, and the Seventh Circuit. [GC Br. 3.]

The Respondent challenges this procedural argument.

The General Counsel also argues that the State of California's actions are neither, determinative evidence of the true reasons for Aldape's discharge nor are they based on a statutory scheme addressing employee protected and or union activities. The General Counsel argues that the State process was fatally flawed by a lack of consideration of Aldape's position and evidence as well as its failure to consider the evidence underlying the Board's processes and proceedings or the union activity issue. The Respondent argues that the General Counsel's opposition is grounded on a lack of understanding of the Respondent's position, i.e., that it is not the accuracy, rigor, or procedural competence of the State's actions, but the simple fact of the State's citation that would have caused Aldape's termination.

Finally, independent of the arguments respecting duration of the backpay period, the General Counsel seeks an order requiring the Respondent to reimburse Aldape for any extra Federal

[1] The specification further alleged the backpay period continues thereafter, but does not address the specifics of any post 2001 remedy. Counsel for the General Counsel effectively modified the specification by her statement on posthearing brief at 2–3, fn. 1:

> [1] It is undisputed that Respondent sent Aldape a written offer of reinstatement on January 11, 2002. It is also undisputed that Aldape failed to respond to that offer. Under these circumstances, backpay is tolled as of January 18, 2002, one week after the reinstatement offer was made, NLRB Casehandling Manual (Part Three) Compliance Proceedings, Section 10529.4 and 10529.8. See also *Easterline Electronics Corp*., 290 NLRB 834, 835 (1988).

and/or State income tax that would result from the single-lump sum payment of any backpay award to her as opposed to the multiyear wages for which the remedy is designed to compensate. The Respondent opposes this request as without supporting authority.

IV. ANALYSIS AND CONCLUSIONS

A. Did 1991 Events Toll Aldape's Backpay Period in that Year?

1. The Board's findings

The Board found, with court approval, the following facts respecting Aldape's 1991 discharge. On June 24, 1991, certified nursing assistant, Nelia Aldape, was given a written warning for an incident in which the daughter of a patient complained about her mother's treatment. Aldape believed the writeup was not justified and immediately began engaging in union activities. In consequence, the Respondent determined to terminate Aldape for her union activities hiding the true motive for the discharge behind the pretext that Aldape's conduct, which had earlier been punished with a written warning, was "gross misconduct" and a dischargeable offense.

The Respondent's area manager brought to the attention of the administrator that, considering the circumstances of Aldape's June 24 written warning, the patient abuse disclosed was a dischargeable offense and that Aldape should not have been given a written warning, but rather should have been suspended pending an investigation to determine if discharge was warranted. The Respondent thereafter solicited a written statement from the patient's daughter dated July 8, 1991, which reads, in part:

> To Whom it may concern,
>
> Nelia Aldape has been rude and mean to my mother. While left standing alone she broke her arm. Nelia stated, "Too bad, she shouldn't have been standing by herself." When my mother asked her to hang up her clothes, she has instead thrown them on the closet floor. She also has stated that it wasn't her job to help my mother, she was only helping someone else out.

Aldape was suspended on July 12, 1991, and discharged on July 15, 1991, for "gross misconduct."

The judge, with Board and court approval, found there was clear and convincing evidence—not just substantial evidence—that Aldape's discharge was motivated by her union activity. The judge, as part of the record on which his decision was based, had received over the Government's objection the Respondent's documentary evidence described below respecting the State of California's postdischarge citation of the facility and related events offered by the Respondent as part of its defense to the Aldape termination allegation.

2. The State of California's postdischarge actions and its consequences

The Respondent's Monterey, California facility involved, is regulated by the State of California, at least in part, through its Department of Health Services. Institutions such as the Monterey facility are issued licenses to operate and certifications to receive funds from Medicare and Medical which, as a practical matter, are critical to the continuing operation of the facility. The State agency also investigates complaints involving facilities.

The State of California documents—the sole evidence offered respecting the State citation process—indicate that, in response to an anonymous complaint, the California Department of Health Services during the period July 18 to July 23, 1991, undertook a complaint investigation visit that included a review of resident records, interviews with staff, the involved resident, and the resident's daughter, along with a review of employee personnel records.

The State Investigator issued a patient care citation, number 07-0753-01215, to the facility, dated August 1, 1991, citing code and regulatory provisions which include a patient's right not to be subjected to verbal or physical abuse of any kind. The citation asserted, inter alia, that following a patient's fall and injury, Aldape commented, "[T]oo bad, she shouldn't have been standing by herself." The citation further states that Aldape

> was terminated from the facility on 6/25/91 for "rude" and "mean" conduct towards [a] resident. After termination, the aide came to [the] facility went to the resident's room and according to the resident,[2] ". . . she gave me a lecture. 'You're making me lose my job.'" The resident replied "I'm sorry you're in trouble. . . ." "She scared me," stated the resident. "My mother has been a wreck and so am I," said daughter. "I am still frightened," said the resident "she [aide] still has friends working here . . . they ask me questions."
>
> The failure of the facility to implement the patient's care plan according to the methods indicated and to treat the resident with consideration, respect and dignity either jointly, separately or in any combination, has a direct relationship to the health, safety or security of the resident as evinced by the residents fall resulting in a fractured left wrist and residents repeated verbal abuse by the aide even after the aide was terminated.

The citation provided for a penalty assessment of $1000. The citation process allowed for appellate review of citations that took place following the citation's issuance.

On August 28, 1991, a conference before a State hearing officer took place respecting this matter and others. The participants included the State and the Respondent but not Aldape or the Union. The hearing officer in a written opinion dated September 24, 1991, upheld the citation and penalty assessed against the facility. He held, inter alia, that Aldape during the month following May 22, 1991:

> [C]ontinued to harass, and verbally and emotionally abuse the resident for causing trouble for her. Finally on June 25, 1991, [Aldape] was suspended and subsequently terminated for rude and mean conduct towards the resident. This harassment even continued after [Aldape]'s termination, when she attempted to be reinstated.

[2] The citation describes the resident as alert and cooperative with periods of confusion.

The hearing officer's decision noted further:

> The [Respondent's] facility objected to the untimely issuance of the citation because it was not issued within three days after the inspection. The facility did not deny the essential facts of the citation. It pointed out that it had implemented its progressive discipline policies in terminating [Aldape] for abuse.

The hearing officer's ruling was susceptible to appeal by submission to binding arbitration, but was not appealed by the Respondent. The ruling became final with the passage of time and the penalty was paid.

The Respondent adduced evidence in the instant compliance hearing from Bonnie J. Christie, the Respondent's managing director of human resources and, in 1991, human resources representative, that without exception the Respondent has fired any patient care employee found by the State of California to have abused patients. She gave a specific example of an individual who:

> was originally terminated when the facility investigated and substantiated the abuse. He went through an appeals procedure and was reinstated. After that is when the State sent us information on their investigation, and the citation, and he was terminated, again, upon receiving that information from the State.

3. Analysis and conclusions

a. The General Counsel's argument that the Respondent's evidence is not appropriately considered

As noted supra, the instant proceeding is not in any manner a reconsideration or review of the merits of the unfair labor practice allegations involved herein. That matter has been concluded. The current stage of the proceeding is rather a compliance specification hearing and resolution procedure predicated on the noted findings and order of the concluded unfair labor practice stage of the case. There is no question, and the parties do not disagree, that the earlier proceedings are res judicata for the proposition that Aldape was wrongfully terminated by the Respondent on July 15, 1991.

The Respondent offers the State of California documentation described above for the proposition that the State of California issued a citation against the Respondent at least in part based on Aldape's conduct finding her an abusive employee. The Respondent then argues that, since the Respondent has always terminated employees who are found to have abused its patients by the State of California, Aldape would have been fired for that reason by the Respondent upon learning that the citation had been issued. The Respondent argues that Aldape would have been fired upon the citation's receipt by the Respondent and therefore backpay should be tolled at that time. While there may be difference as to whether the actual time of tolling should be the August 1, 1991 date of the citation or the date of the hearing officer's September 24, 1991 denial of the Respondent's appeal of the citation, the Respondent seeks essentially to cut the backpay period from a period exceeding a decade to a period of weeks or a few months.

The General Counsel's procedural res judicata arguments noted supra are not fully focused on the Respondent's argument that Aldape would have been fired because of the State citation irrespective of the underlying merits of that citation. To the extent the General Counsel argues that the earlier proceeding is res judicata for the proposition that the Respondent improperly fired Aldape in July 1991, that assertion is clear and not under challenge. To the extent the Government argues the earlier Board and court rulings are res judicata for the proposition that the State process was considered by the judge, Board and court and rejected for all relevant aspects of the case including the Respondent's argument that the backpay period was tolled as a result, I find the argument goes too far.

It is not clear from the record or the findings of the judge, the Board, or the court that the California State evidence respecting the State proceedings was considered or findings made respecting the State proceeding beyond the fact that the evidence was rejected as relevant to determine whether or not the earlier occurring discharge was an unfair labor practice. It seems to me that the evidence at issue, even if offered under a broader theory of relevance by the Respondent at the unfair labor practice hearing, was and remains relevant in the current compliance stage to the Respondent's argument that the State action constitutes an independent, free standing, subsequent, basis for discharging Aldape. I therefore reject the General Counsel's res judicata and relevance objections to the consideration of the Respondent's evidence under the theory described.

I therefore agree with the Respondent that its evidence is properly received for the proposition that the State issued a citation against the Respondent finding, inter alia, that Aldape had engaged in patient abuse. I further find that the Respondent has also adduced evidence that the Respondent has a history of terminating patient care employees found to have engaged in patient case abuse by the State of California. I further agree with the Respondent that even where, as here, an employee has been found to have been improperly discharged, evidence that the individual would have thereafter been fired may in appropriate circumstances support findings tolling the discriminatee's reinstatement rights and cutting off her backpay period.

b. The Respondent's argument that the evidence supports a finding that the Respondent would have terminated Aldape in response to the State citation, even if no union activities had occurred

In considering the argument of the Respondent, it is important to insure that it does not involve reconsideration or modification of the earlier unfair labor practice findings concerning Aldape's discharge, discussed supra. Further, as the parties seem to agree and as the General Counsel established on brief in a scholarly review of the case law, it is the Respondent who bears the burden of proof when seeking to establish a termination of the backpay obligation and tolling the backpay period.

For the Respondent's defense to be successful, it must carry its burden to establish that the State citation process would have occurred as it did, even if no union activity had occurred. Put another way, the Respondent must establish that its wrongdoing respecting Aldape, as found in the unfair labor practice portion of the case, did not initiate or cause, significantly contribute to, modify or otherwise taint the State process. And, second, it

must demonstrate that the State citation process would have produced the termination that it avers would toll the backpay period involved herein.

The Respondent's evidence of the State citation process as described above is comprised entirely of the State documents themselves. They establish the participation of the Respondent in the process as well as the nonparticipation of Aldape and the Union. The General Counsel argues that the State process was for this and other reasons unable to produce or sustain a finding that Aldape had in fact engaged in conduct rising to the level of a dischargeable offense. That is not the Respondent's theory and therefore the State process is not fatally compromised from those facts alone. The absence of the participation of the Union or Aldape, however, makes it more likely that the State process was not independent of and was rather a continuation of and tainted by the Respondent's earlier process of creating evidence to support the pretext of patient abuse rising to the level of a dischargeable offense in order to cloak its illegal decision to suspend and discharge Aldape. Since the information the State received and acted upon was from the limited sources noted supra, the Respondent is in no position to assert that the State considered other evidence.

In considering the State citation process, including the findings of the hearing officer, it is clear to me that the Respondent has not established that the State citation process would have proceeded as it did, had Aldape never engaged in union activities. Put another way, I find that the Respondent has not established that the State of California process described above would have occurred as it did absent the Respondent's wrongful reopening of its Aldape discipline after her union activities commenced and the Respondent determined to discharge her for those activities reconsidering the patient abuse discipline earlier issued her in a scheme to provide a pretext to shelter the Respondent's true illegal motive for the discharge. Thus, I find the entire State process respecting the patient abuse allegations was not independent of the Respondent's earlier improper actions, considered highly suspect evidence, and was therefore tainted and was not reliable. I further find that in consequence the actions of the State of California may not be relied on by the Respondent to argue that Aldape would have been discharged.

Two elements independently undermine the argued independence of the State process. First, the State investigation clearly involved consideration of the evidence the Respondent obtained after it decided to discharge Aldape for her union activities and reopened the matter for further investigation. This is evidence the judge with Board approval found to have been collected with a motive to concoct a false, but benign, reason for Aldape's discharge so to conceal the true illegal basis for it.

Thus, for example there are identical attributions of Aldape's purported remark about the injured patient: "Too bad, she shouldn't have been standing by herself," in both the July 8, 1991 statement solicited by the Respondent as part of its pretext evidence and the subsequent State of California report, quoted supra. The unfair labor practice proceedings conclusively established the nonobjectivity of the Respondent's postunion activities reinvestigation of Aldape's actions. The evidence it gathered or created had been found designed to support Aldape's illegal suspension and discharge. That same tainted evidence clearly informed in a significant way the States investigation and was clearly at the very least a significant part of the reasons behind the State citation and its reaffirmation on review.

Indeed there is a real question in my mind of whether or not the entire State complaint process was not simply initiated by the Respondent as a further attempt to avoid responsibility for its illegal termination of Aldape. Thus, the initiator of the complaint was anonymous. The administrative law judge in the unfair labor practice portion of the proceeding noted that: "It does not appear that the patient's daughter was seeking more severe discipline for Aldape" even when the discipline at that stage was simply a warning. Who then, but the Respondent's agents, might have initiated the complaint to the State anonymously? The evidence of the entire process is limited and it is the Respondent who bears the evidentiary burden.

The State citation and citation review process did not involve Aldape or the Union. A recitation of postdischarge contacts between Aldape and the patient were a significant part of the State's rationale for the citation yet were not mentioned or dealt with in the unfair labor practice proceeding nor do they jibe smoothly with the discipline and discharge dates contained in the citation. In this connection, the Respondent allowed to pass unchallenged glaring errors of fact about Aldape in the State of California citation report—for example that she was suspended and fired in June—an error which is important since "postdischarge conduct" cannot be properly identified when the wrong date for Aldape's discharge is believed by the State.

The Respondent seemingly did little if anything to correct the glaring factual errors in the State documents. The hearing officer found: "The facility did not deny the essential facts of the citation." Also, the Respondent apparently at all times overtly agreed with the State that Aldape had committed patient abuse—important and critical words under the relevant standards. The Respondent's appeal of the citation was not based on the noted errors of fact which it did not contest, but rather the Respondent opposed the citation on technical grounds regarding when the citation was issued—matters not relevant here.

Having examined the entire record with care, I am simply unable to conclude that the Respondent has established sufficient separation of itself and its earlier adjudicated manufacture of a false basis for firing Aldape from the process of investigation and deliberation that resulted in the final State of California citation. I specifically find that the State's effort was tainted by the conduct of the Respondent and the evidence prepared by the Respondent to a sufficient extent that the Respondent may not rely on the State's citation to toll Aldape's backpay or her right to reinstatement.

In reaching this determination based on the unusual facts of the case, I have been mindful of the Board's admonition in footnote 5 of its decision, quoted above and repeated here:

> [5] We do not in any manner condone patient abuse. Where the Respondent has raised this matter here and, as discussed elsewhere by the judge, at other facilities in which it was alleged to have occurred, we adopt the

> judge's findings of unlawful conduct solely for the reason that the Respondent failed to establish such allegations. . . .

I am satisfied that on the facts of this case there has not been additional credible evidence offered sufficient to show such abuse by Aldape or to toll her right to backpay and reinstatement for that reason.

The judge, with Board and court approval, found no patient abuse by Aldape warranting the Respondent's discharge of her for that reason. That finding was not before me for review or reconsideration. The State of California did in fact find abuse at least in part based on the same series of events as those considered in the unfair labor practice proceeding. I have found however that the State's investigation and citation procedures were tainted by: (1) the inclusion of the Respondent's evidence gathered during its postunion activities period in support of its pretext defense—patient abuse meriting discharge—to hide the true illegal reason for the discharge and (2) the Respondent's acquiescence during its hearing on appeal of the citation in factual errors in the State's citation and in its noncontest of the assertion of patient abuse by Aldape. In such a setting, where the Respondent has been involved in shaping the outcome, the Respondent cannot rely on the State's citation to ague it would have terminated Aldape upon its receipt of the citation. In effect, the Respondent's entire course of conduct through the citation process, rendered the citation insufficiently separate and apart from the original wrongful discharge to argue it is an independent basis for the termination.

B. The Issue of Reimbursement for Excessive State and Federal Income Tax Reductions

Aldape, the backpay claimant, will receive over 10 years of backpay in a single payment under the terms of this Order. That money will be taxable income in the year received. Thus, in effect, because of the nature of the Board's proceedings, she will be taxed as having received in 1 year a gross amount that she would in the normal course have received over a 10-year period and annually paid taxes on the portion received in each year. Since progressive income tax rates operate both federally and at the State level to favor smaller incomes, I agree with the General Counsel that Aldape will be taxed more heavily and therefore receive less net recovery under the Board remedy directed herein, than if an appropriate adjustment is made for the heavier taxation arising from single payment the Board's remedy involves.

The General Counsel seeks such a provision for increased taxes in this case and argues that similar procedures are in use in other settings and under other statutes. The General Counsel reviews earlier contrary Board cases and argues that times and circumstances have changed and "it is time to present this issue to the Board anew." (GC Br. 19.) The Respondent opposes the request as without supporting precedent.

Board case law commands its administrative law judges to follow the law, not to change existing Board precedent. It may well be time to present the instant issue to the Board, as the Government argues, but it is not time for a judge to initiate such a reevaluation of established procedure. The Respondent is correct, the request is without supporting Board authority. The current case law does not provide for the relief sought, therefore I shall decline to provide relief for the disproportionate effect of progressive taxation in reducing the net amount which will in fact come to Aldape from of the relief granted herein. The General Counsel may, of course, present the matter to the Board on exceptions.

On the basis of the foregoing, and pursuant to Section 10(c) of the Act, it is recommended that the Board issue the following Order.[3]

ORDER

It is hereby ordered that the Respondent, Beverly California Corporation, f/k/a Beverly Enterprises, its Operating Divisions, Regions, Wholly-Owned Subsidiaries and Individual Facilities and each of them (Beverly Manor Convalescent Hospital, Monterey, California), as well as their successors, and assigns, shall forthwith provide backpay plus appropriate interest in accordance with the Board's order for Nelia Aldape. More specifically the sums to be paid are those alleged in the compliance specification and its appendices issued by the Acting Regional Director for Region 32 on February 22, 2002, plus appropriate interest. The amount due, without interest, is:

$64, 403.51

No provision of an additional payment to compensate the claimant for the increased taxation applicable to a single payment for a 10-year backpay period shall be directed.

The backpay period alleged in the compliance specification, as constructively amended by the General Counsel on brief and sustained supra, extends to January 18, 2002. The compliance specification alleged and I have found specific amounts due for a period ending December 31, 2001. This supplemental decision therefore does not address backpay amounts, yet to be determined, for the period January 1, 2002, through January 18, 2002.

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[3] In the event no exceptions are filed as provided in Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.